No. 11-998

IN THE

Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,
Petitioner,

v.

STEVE TRUNK, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE FAMILY RESEARCH COUNCIL AND 20 MEMBERS OF THE SENATE AND HOUSE OF REPRESENTATIVES IN THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KENNETH A. KLUKOWSKI
FAMILY RESEARCH COUNCIL
801 G Street, N.W.
Washington, D.C. 20001

NELSON LUND
Counsel of Record
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 933-8045
nlund@gmu.edu

March 14, 2012

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the Mount Soledad Veterans Memorial—recognized by Congress as a "National Veterans Memorial" that has stood for over 50 years "as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States"—violates the Establishment Clause because it contains a cross among numerous other secular symbols of patriotism and sacrifice?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(CONTINUED)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The Family Research Council (FRC) is a 501(c)(3) nonprofit public-policy organization headquartered in Washington, D.C., educating citizens on religious liberty and governmental policies affecting America's families. Founded in 1983, FRC studies policies that protect and strengthen families and advance religious liberty consistent with America's first principles and longstanding practices.

Remaining *amici curiae* are twenty Members of the Senate and House of Representatives in the United States Congress, each of whom represents constituents whose interests are implicated by whether this Court decides to take this case. Congress took the extraordinary step of enacting two statutes to federalize the Mount Soledad Veterans Memorial to save and preserve the memorial, a national goal that can only be realized if this Court grants the petition. These Members are listed in the appendix to this brief.

---

[1] No counsel for any party authored this brief in whole or in part and no one apart from *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

SUMMARY OF ARGUMENT

This case presents an appropriate vehicle for addressing a three-way circuit split on the proper Establishment Clause test for passive memorials containing religious imagery. The split has arisen because of irremediable flaws in the "endorsement of religion" test that this Court narrowly adopted in 1989. That test should now be replaced.

The endorsement test has proved as unworkable in practice as it is unsound in principle. This Court has issued a series of narrowly-divided and splintered decisions that have confused the lower courts, baffled the public, and given government officials strong incentives to suppress legitimate religious expression in order to avoid the costs and hazards of litigation.

Scholarly commentators are as sharply divided as the Court about the proper interpretation of the Establishment Clause, but there is wide agreement about one thing: The endorsement test does not represent either a correct interpretation of the Constitution or a workable basis for a coherent jurisprudence. There is simply no hope that anyone will figure out how to clarify the endorsement test so as to avoid the serious problems that it has manifestly generated during its short and troubled life.

The Court should abandon the endorsement test and restore its traditional understanding, which was grounded in the constitutional text, history, and earlier precedent. The traditional test simply requires government to refrain from coercing

participation in any religion or religious exercise, or from effectively creating a state religion.

REASONS FOR GRANTING THE PETITION

The endorsement test narrowly adopted in *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573 (1989), has created enormous confusion and uncertainty, which has been aggravated by the splintered decision in *Van Orden v. Perry*, 545 U.S. 677 (2005).

The Court should address the 2-2-1 circuit split over the appropriate test for evaluating whether a passive memorial display with religious imagery violates the Establishment Clause. More specifically, the Court should clarify the applicable law, and decide whether to set aside the "endorsement test"—as five Justices have urged over the past three decades—and instead adopt the "coercion test." *See* Pet. Cert. 18 n.4. Under the coercion test, "government may not coerce anyone to support or participate in any religion" or otherwise directly benefit religion to such a degree as to effectively establish a national religion. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The lower courts have been unable to apply the endorsement test consistently, and the scholarly literature strongly suggests that they will never be able to do so. This Court itself implicitly suggested as much through its unwillingness or inability to apply the test in *Van Orden*. *See* 545 U.S. at 681 (plurality opinion); *id.* at 700 (Breyer, J., concurring in the judgment). The four Justices who dissented

from the adoption of the endorsement test in 1989 were correct, and the time has come for the Court to recognize that they were right.

I. ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN CHAOS, WITH THE CIRCUITS SPLIT THREE WAYS.

A. Just over twenty years ago, in a 5–4 opinion, this Court adopted a novel test for judging the constitutionality of public displays that include religious images, one that asks "whether the challenged governmental practice either has the purpose or the effect of 'endorsing' religion." *Allegheny*, 492 U.S. at 592 (citations omitted). Justice O'Connor had previously articulated and advocated the view underlying this test, which is that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). This theory was devoid of support in America's history or law prior to that time.

The novel test produced confusion from the outset. Applying this new endorsement test, the *Allegheny* Court invalidated a nativity display in a county courthouse 5–4, but upheld a menorah display outside the courthouse by a different 6–3 majority. *Id.* at 578–79, 601–02, 620. This began a series of narrow and controversial rulings employing a subjective and unworkable test that is without historical foundation.

The Court implicitly recognized the endorsement test's unworkability in *Van Orden*, which held that a Ten Commandments display at the Texas State Capitol did not violate the Establishment Clause. 545 U.S. at 681 (plurality opinion). A plurality of the Court recognized that applying the endorsement test would lead to the destruction or removal of a longstanding monument with religious imagery sacred to many Americans, *see id.* at 688–89,[2] a result that would astound the framers and ratifiers of the Establishment Clause and is not remotely required by the precedents of this Court preceding 1989. The plurality opinion instead reasoned that the display should be evaluated "both by the nature of the monument and by our Nation's history." *Id.* at 686.

Similarly, Justice Breyer explained that the Constitution "does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (Breyer, J., concurring in the judgment) (citations omitted). Concurring only in the judgment, Justice Breyer maintained that in "difficult borderline cases" there is "no test-related substitute for the exercise of

---

[2] Among other faith-related displays relevant here, the plurality noted approvingly, "So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments *and a cross*, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia." *Van Orden*, 545 U.S. at 689 (plurality opinion) (emphasis added).

legal judgment." *Id.* at 700. Accordingly, there is now no clear governing rule or rationale in this important area of the law.

B. Subsequent to *Van Orden*, a 2-2-1 split has developed among the circuits regarding which test to apply. The Fourth and Eighth Circuits have applied Justice Breyer's legal judgment test. *See ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 777−78, 778 n.8 (8th Cir. 2005) (*en banc*) (upholding Ten Commandments display); *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005) (upholding daily Pledge of Allegiance recitations).[3] The Sixth and Tenth Circuits, by contrast, continue to apply the endorsement test. *See ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (upholding courthouse Ten Commandments display); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2009) (upholding official city seal displaying three crosses).

Illustrating the depth and extent of the confusion among the circuits, the court below was unable to discover which test should apply in this case, and purported to apply *both* tests. Pet. Cert. App. 18. In reality, however, the court below applied the endorsement test, which had been rejected by a majority of this Court in *Van Orden*. *See*, *e.g.*, *id.* at 24, 43, 45. This was certainly a "borderline case" within the meaning of Justice Breyer's concurrence,

[3] In *Myers*, the Fourth Circuit looked to *Van Orden* even though the case did not concern a passive display. This decision further highlights the current confusion regarding the applicable law, and the need for this Court to address the circuit split.

for five judges of the court below dissented from the denial of rehearing *en banc*.

II. THE PRIMARY CAUSE OF THE CHAOS REGARDING THE ESTABLISHMENT CLAUSE IS THE UNWORKABLE, UNPREDICTABLE, AND UNGROUNDED ENDORSEMENT TEST.

The current chaos in Establishment Clause jurisprudence is in large part due to the endorsement test. It is a test that has divided this Court and confused the lower courts. It has met with widespread criticism across a wide spectrum of scholars, and it has confounded both the general public and officials seeking to stay within the Constitution's limits.

A. *Van Orden* and other decisions and opinions of this Court confirm that the endorsement test is unworkable.

Since 1989, the Court's attempts to apply the endorsement test have resulted in splintered and narrowly-divided decisions. The results have been unpredictable, with the Court's narrow or fractured opinions eliciting vigorous dissents. This occurs both when a challenged government action is upheld under the test, *see, e.g.*, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (plurality); *id.* at 772–75 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 800 n.5 (Stevens, J., dissenting), as well as when the Court invalidates the challenged action, *see, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *id.* at 318 (Rehnquist, C.J., dissenting).

Even Members of the Court supporting an endorsement principle have not agreed on the proper application of the test. For example, Justice Stevens rejected Justice O'Connor's reasonable observer as a "legal fiction." *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting). This "ideal human" in Justice O'Connor's theory "knows and understands much more than meets the eye." *Id.* This fictional character "comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context." *Id.*

These divisions within the Court culminated in *Van Orden*, where the Court was unable to agree on a majority opinion. Justice Breyer's solo concurrence articulated a new "legal judgment" test for some imprecisely-defined class of passive displays. This attempt at a new formulation is itself a sign that the endorsement test is not settled law and that the Court should reconsider the path it has taken since 1989.

Justice Breyer's legal judgment test in effect creates a loophole in the endorsement test for cases in which that test would lead to deeply troubling outcomes. Such an *ad hoc* approach is unsustainable. The Court should instead adopt a test more consistent with the original meaning and purpose of the Establishment Clause, and capable of predictably producing correct results.

B. The endorsement test has created hopeless disarray in the lower courts.

In order to determine whether a display endorses religion, the endorsement test asks how the display

would appear to an "objective" or "reasonable" observer. "The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act. *Santa Fe*, *supra*, at 308 (quoting *Wallace* [*v. Jaffree*, 472 U.S. 38, 76 (1985)] (O'Connor, J., concurring in the judgment))." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (internal quotation marks omitted); *see also Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment).

It is anyone's guess what this really means. For example, the circuit courts have split when applying the endorsement test to materially indistinguishable displays. The Ten Commandments in *Mercer County* were displayed inside a county courthouse, along with other documents of legal and historical import. 432 F.3d at 626. The Sixth Circuit held that this display was not an endorsement of religion. *Id.* at 635–39. Four years later, the Tenth Circuit considered a Ten Commandments display erected alongside purely secular monuments on the lawn outside a county courthouse. *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 787–89 (10th Cir. 2009). Applying the same endorsement test as the Sixth Circuit, the Tenth Circuit concluded that the display violated the Establishment Clause. *Id.* at 796, 804–07.[4] These two displays should stand or fall

[4] The Tenth Circuit denied *en banc* rehearing by a 6–6 vote, with the dissenting judges faulting their colleagues for not employing *Van Orden*, which they believed would validate the monument. *See Green*, 574 F.3d 1235, 1235–39 (10th Cir. 2009) (Kelly, J., dissenting from denial of reh'g *en banc*).

together under the same test. If anything, the display invalidated in *Green* should have been upheld, as it was *outside* on the courthouse lawn, whereas the display upheld in *Mercer County* was *within* the courthouse. Such conflicting and counterintuitive outcomes underscore judicial inability to apply the endorsement test in a principled and reliable manner.

The disarray in the lower courts is not a recent development. For example, shortly after *Allegheny* upheld the display of a menorah outside a public building, a divided panel of the Second Circuit invalidated a similar display because of slight factual differences. *Kaplan v. City of Burlington*, 891 F.2d 1024, 1028 (2d Cir. 1989).

The lower courts were also quick to issue split decisions that conflicted with one another. For example, the year after *Allegheny*, a divided panel of the Fourth Circuit invalidated the display of a crèche on the ground that religious images are permissible only when sufficiently offset by surrounding non-religious images. *See Smith v. City of Albermarle*, 895 F.2d 953, 955–58 (4th Cir. 1990). The very same day, a divided panel of the Sixth Circuit interpreted the endorsement test in a different way, permitting a stable scene used for nativity reenactments if accompanied by a sufficiently prominent written disclaimer of any intent to convey a religious message. *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990).

It is no accident that the case law that developed in the wake of *Allegheny* has been at best confusing and at worst incoherent. The endorsement test is fatally flawed by the subjective discretion that

reviewing courts must exercise in determining what a "reasonable" observer would perceive and feel, and on the basis of what information those perceptions and feelings would arise.

The decision of the court below, which effectively conflated the endorsement test with Justice Breyer's legal judgment test, confirms that the federal courts "remain in Establishment Clause purgatory." *Mercer County*, 432 F.3d at 636.

C. Scholars across the spectrum agree that the endorsement test itself is the cause of the chronic confusion in the courts.

Further wrestling with the endorsement test is unlikely to produce a workable refinement or clarification. Since Justice O'Connor first suggested the test in *Lynch* in 1984, and continuing after the Court narrowly adopted it in *Allegheny*, it has been subjected to withering criticism from a broad range of commentators. These scholars, who agree on little else about the Establishment Clause, share the view that this test is unworkable and inconsistent with the Constitution. The "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 163 (1986).

Most scholars fall into one of two principal groups. "Accommodationists" generally believe that the endorsement test puts too many restrictions on the

government's discretion to employ or permit the use of religious images in public places. "Separationists" generally believe that the test does not sufficiently suppress the use of religious imagery in public. Both groups have arguments to support their opposing views of what the Constitution requires and what an appropriate legal test *should* do, but neither group believes that the existing law has led or can lead to a consistently defensible set of results.

1. Professor Michael McConnell, a prominent and respected accommodationist critic of the Court's recent Establishment Clause jurisprudence, concluded a few years after *Allegheny* that the "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life . . . ." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 116 (1992) ["McConnell, *Crossroads*"].

Responding to Justice O'Connor's stated goal of designing the endorsement test to achieve consistent results, *see Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), McConnell concluded that "this goal of consistency is the test's greatest failing." McConnell, *Crossroads*, *supra*, at 148. There are several reasons for the test's failure to deliver the desired results.

First, endorsement cannot be clearly defined, because "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to

make this assessment." *Id.* The "concept of 'endorsement' therefore provides no guidance to legislatures or to lower courts about what is an establishment of religion. It is nothing more than an application to the Religion Clauses of the principle: 'I know it when I see it.'" *Id.* (citation omitted).

McConnell traces the development of the endorsement principle, and finds it the product of a flawed approach to the Religion Clauses. Establishment Clause jurisprudence has become so far divorced from this Court's longstanding precedents that it would be utterly unrecognizable, not only to the Framers, but also to courts throughout most of our history. "It is like stepping into a time warp to read the establishment clause opinions of the 1940's, 1950's, and 1960's." Michael W. McConnell, *The Origins of the Religion Clauses of the Constitution: Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 933 (1986) ["McConnell, *Coercion*"]. Showcasing how far our jurisprudence has strayed from the Clause's historical purpose, McConnell asks, "Was it really Justice Brennan . . . who told us that, in deciphering the first amendment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?'" *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

2. Professor Steven Smith focuses on the ahistorical roots of the endorsement test: "If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of

government and religion, did not." Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 966 (1989). Smith explains: "Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. [Thus,] Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out." *Id.*

According to Smith, the failure to begin with a proper understanding of the Establishment Clause has led to the current judicial quagmire. "Far from eliminating the inconsistencies and defects that have plagued establishment clause analysis, the [endorsement test] introduce[s] further ambiguities and analytical deficiencies into [Establishment Clause] doctrine." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 267 (1987).

3. The endorsement test also fares poorly among separationists. When the test first appeared in Justice O'Connor's concurring opinion in *Lynch*, Professor Laurence Tribe objected that the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or*

Economic Efficiency?, 98 Harv. L. Rev. 592, 611 (1985) (footnote omitted). Professor Mark Tushnet echoed this objection: Justice O'Connor's conclusion in *Lynch* that the crèche at issue was not an endorsement of religion "came as a surprise to most Jews." Mark Tushnet, *The Constitution of Religion*, 18 Conn. L. Rev. 701, 712 n.52 (1986).

4. Likewise, Professor Steven Shiffrin charges that the endorsement test tries and fails to frame a facially-neutral test with the appearance of equal treatment. Shiffrin argues that the *Allegheny* Court should have held that the "county's action favors Christianity. This it may not do. End of case." Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 Cornell L. Rev. 9, 63 (2004). Shiffrin also criticizes Justice O'Connor's conclusion that the Pledge of Allegiance is constitutional, citing this as an example of the failure of the endorsement test to stop religious establishments. *See id.* at 67–76.

5. Professor Steven Gey criticizes the endorsement test as "half-heartedly enforcing the separation principle" that he believes is mandated by the Establishment Clause. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. Ill. L. Rev. 463, 476. He also articulates the widespread criticism that the endorsement test employs an unacceptably subjective standard. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." *Id.* at 477. Much like McConnell, Gey points out that "[t]he obvious

problem with any approach that measures constitutional compliance by the *appearance* of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478–79 (emphasis added). In sum, "any hypothetical 'objective observer' is only as objective as its creator wants the observer to be." *Id.* at 479.

6. Professor Jesse Choper stresses the unworkability and perverse effects of the endorsement test, writing of the "reasonable observer" that:

> [L]ower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable . . .

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & Pol. 499, 510 (2002); *see also id.* at 510–34 (elaborating on these points).

7. The passage of time has not enabled scholars to devise a rescue plan for the endorsement test. On the contrary, scholars across the jurisprudential

spectrum continue to criticize the test.[5] Some scholars even question whether the endorsement test is still controlling. *See, e.g.*, Lisa Shaw Roy, Pleasant Grove City v. Summum*: Monuments, Messages, and the Next Establishment Clause*, 104 Nw. U. L. Rev. 280, 287–88 (2010). However "realistic" that conclusion may be, this Court has said that "the view of five Justices that a case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law." *Agostini v. Felton*, 521 U.S. 203, 217 (1997). Confusion reigns, and will continue to reign until this Court reconsiders *Allegheny*'s endorsement test.

D. The endorsement test has spawned excessive litigation resulting in a chilling effect.

The current confused state of the law has a chilling effect on protected First Amendment interests, producing *in terrorem* effects on public officials charged with deciding when, how, or whether to permit the use of religious images in

---

[5] *See, e.g.*, Patrick M. Garry, *Wrestling With God: The Courts' Tortuous Treatment of Religion* 57–69 (paperback ed. 2007) (discussing the "pitfalls" of the endorsement test); Paul E. MacGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 Ariz. St. L.J. 585, 618–20 (2008) (arguing the endorsement test produces a "mixed bag" of results); Robert J. D'Agostino, Selman *and* Kitzmiller *and the Imposition of Darwinian Orthodoxy*, 10 B.Y.U. Educ. & L.J. 1, 33 (2010) (characterizing the endorsement test as "[d]elving into mind reading"); Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. Cin. L. Rev. 1017, 1053 (2011) (calling reliance on the test "misplaced . . . because it focuses on the wrong person").

public spaces. Government officials cannot reasonably predict *ex ante* which displays will be held constitutional and which unconstitutional. To avoid the specter of costly litigation, public officers—especially at the local level where financial resources for legal defense are scarce—will simply deny requests to erect memorials or allow activities that some could allege have a religious element. A test facilitating such oppressive apprehension cannot be reconciled with the foundational values protected by the First Amendment.

As Justice Kennedy and three other Justices predicted at the outset, the endorsement test has led to outcomes evincing "hostility [toward religion] inconsistent with our history and our precedents." *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Ninth Circuit struck down the Pledge of Allegiance as unconstitutional on the ground that "one Nation under God" is an endorsement of religion. *Newdow v. U.S. Cong.*, 292 F.3d 597, 607–09 (9th Cir. 2002), *as amended*, 328 F.3d 466, 490 (9th Cir. 2003), *rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004). The National Day of Prayer was invalidated under the endorsement test. *Freedom From Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1057 (W.D. Wis. 2010), *vacated on jurisdictional grounds*, 641 F.3d 803, 808 (7th Cir. 2011). Ubiquitous expressions and displays of widely held beliefs integral to our national fabric are regularly beset by hostile attacks divorced from the historical understanding of the Establishment Clause.

Prudent public officials are understandably reluctant to rely on standing doctrines to protect them from such litigation. Even if they could be sure that no plaintiff with standing will ever emerge, they still face the prospect of significant costs (financial and otherwise) in litigating such cases. In any event, plaintiffs with standing can frequently be found, and a significant number of cases involving religious displays have already consumed enormous resources during the short life of the endorsement test.

The path of least resistance, and the path of due regard for the innocent taxpayer, will often counsel erring on the side of banning religious symbols. In that way, even if in no other, the existing jurisprudence operates to suppress religious imagery in ways that go well beyond what this Court has ever indicated is legally required or appropriate.

This is not just inside baseball. Members of the public immediately found *Allegheny*'s decision to strike down a nativity scene while upholding the display of a menorah baffling, or worse. The *Los Angeles Times*, for example, editorialized that the Court "needlessly blurred" the "crucial line" drawn by the Establishment Clause. "Such a[n endorsement] standard . . . is and should be offensive to sincere believers. More to the point, it is an open invitation to endless and needlessly divisive litigation." Editorial, *Blurring the Lines*, L.A. Times, July 5, 1989.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR CLARIFYING ESTABLISHMENT CLAUSE JURISPRUDENCE.

The Court should use this case to restore some order to its undeniably problematic Establishment Clause jurisprudence. The legal question of the governing test is squarely presented, and the appropriate alternative rule is ready at hand.

A. This case highlights the importance of the current legal uncertainty and cleanly presents the question of determining the governing law.

The decision below is the best illustration yet of the chaos surrounding the Establishment Clause, and the case presents a question that will enable the Court to reconsider and reform its jurisprudence. The outcome turns on a pure question of law: what is the test used to determine whether the Establishment Clause has been violated by a passive display that incorporates religious imagery?

There are no vehicle problems with this case and the facts are well-established. *See* Pet. Cert. App. 7–13.[6] This case simply involves a cross as part of a

[6] This case is factually different from *Am. Atheists, Inc., v. Duncan*, 637 F.3d 1095 (10th Cir. 2010), which came to this Court as *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, *cert. denied*, 132 S. Ct. 12 (2011). That case involved roadside crosses in Utah, each consisting of "a Latin cross and a public insignia." *Id.* at 20 (Thomas, J., dissenting from the denial of certiorari). The public insignia each cross bore was the official symbol of a department of the Utah state government, *Duncan*, 637 F.3d at 1111, which presented a complicating factual factor. No such complicating factors are present here.

longstanding passive memorial display. Pet. Cert. 2–5. The cross in question is a plain, unadorned Latin cross, which mirrors crosses found in military cemeteries and war memorials nationwide, and is even accompanied by a plaque explaining its secular purpose. *Id.* at 16. Despite decades of effort to reach an accommodation or cure alleged defects, the court below held that the presence of the cross made this memorial an unconstitutional endorsement of Christianity. Pet. Cert. App. at 59–62.

If the test is whether a subjective and selectively knowledgeable fictitious observer would conclude that government was endorsing religion, then the case could unpredictably go either way. Should the Court instead declare that the proper test for the Establishment Clause is whether a passive display coerces any citizen to participate in or lend support to religion, this case would come to a speedy and agreeable end. Moreover, such a ruling would reduce vexatious litigation nationwide, and allow the courts to resolve future cases with dispatch.

The significance of this case is further highlighted by the fact that the United States Congress took the extraordinary step of federalizing this memorial dedicated to those who sacrificed for this Nation. Pet. Cert. 2–4. There could hardly be a more fitting occasion for the Court to rethink what it has been doing.

B. The Court should acknowledge the deficiency of the novel and subjective endorsement test and instead adopt the historically-grounded coercion test defended by four Justices in *Allegheny*.

The endorsement test was a novelty when Justice O'Connor devised it in her *Lynch* concurrence, 465 U.S. at 687–91, and it was unprecedented when the Court narrowly adopted it in *Allegheny*. That adoption was clearly a mistake, as Justice Kennedy eloquently demonstrated in his *Allegheny* dissent. The test immediately produced conflicting results in almost indistinguishable cases. And since *Van Orden* rejected, modified, or muddied the endorsement test sixteen years later, Establishment Clause jurisprudence has become so riddled with inconsistencies and uncertainties as to render it all but incoherent. What *is* clear, by contrast, is that the endorsement test is unworkable, divorced from longstanding principles, and not the kind of settled law that can engender substantial reliance.

Twenty-three years of experience have richly confirmed Justice Kennedy's initial diagnosis, and provided a wealth of reasons to return to the long-established principles that he and the other dissenters defended:

> "[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."

Allegheny, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting *Lynch*, 465 U.S. at 678) (brackets in the original).

There is perhaps no element of Establishment Clause jurisprudence that has deviated farther from the historical purpose of the Clause than the endorsement test. Even if the Court is not prepared to return entirely to first principles, rejection of the recently minted endorsement test would correct an unnecessary and unhelpful deviation. Not so long ago, government coercion was central to this Court's understanding of religious establishment. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The "Court's decision to abjure coercion as an element of an establishment clause claim essentially was without explanation." McConnell, *Coercion*, *supra*, at 935.

The Court's adoption of the endorsement test in 1989 formalized this deviation. Restoring coercion as a required element of Establishment Clause violations would bring the law much closer to the purpose it was meant to serve when our Nation began, a purpose with which this Court was perfectly comfortable through most of its history.

This approach is far more consistent than the endorsement test with the original meaning of the First Amendment. It is consistent with the weight of pre-1989 case law. It is perfectly capable of principled and consistent application by the courts. And its restoration will prevent reasonable observers from concluding that this Court's jurisprudence "border[s] on latent hostility toward religion."

Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the Court should reconsider the proper test to apply in Establishment Clause cases.

Respectfully submitted,

NELSON LUND
Counsel of Record
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 993-8045
nlund@gmu.edu

KENNETH A. KLUKOWSKI
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001
(202) 637-4617
kklukowski@frc.org

March 14, 2012

APPENDIX

APPENDIX A

Twenty Members of the United States Congress have joined this brief as *amici curiae*—three Senators and seventeen Representatives.

The three Members of the United States Senate who joined this brief as *amici curiae* are the Honorable:

Sen. John Boozman of Arkansas

Sen. Jim DeMint of South Carolina

Sen. David Vitter of Louisiana

The seventeen Members of the United States House of Representatives who joined this brief as *amici curiae* are the Honorable:

Rep. Brian P. Bilbray, of the 50th District of California

Rep. Charles W. Boustany, Jr., of the 7th District of Louisiana

Rep. Trent Franks, of the 2nd District of Arizona

Rep. Louie Gohmert, of the 1st District of Texas

Rep. Jeff Fortenberry, of the 1st District of Nebraska

Rep. Duncan D. Hunter, of the 52nd District of California

Rep. Jim Jordan, of the 4th District of Ohio

Rep. Mike Kelly, of the 3rd District of Pennsylvania

Rep. Steve King, of the 5th District of Iowa

Rep. Doug Lamborn, of the 5th District of Colorado

Rep. Stevan Pearce, of the 2nd District of New Mexico

Rep. Mike Pence, of the 6th District of Indiana

Rep. Tom Price, of the 6th District of Georgia

Rep. Steve Scalise, of the 1st District of Louisiana

Rep. Jean Schmidt, of the 2nd District of Ohio

Rep. David Schweikert, of the 5th District of Arizona

Rep. Fred Upton, of the 6th District of Michigan